6

06-11543

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489
By: Margaret A. Katze
Attorney for Petitioner

SERVICE TO:

Solicitor General
Department of Justice
Washington, D.C. 20530

Assistant United States Attorney David N. Williams
P.O. Drawer 607
Albuquerque, NM 87103

May 22, 2007

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

QUESTION PRESENTED FOR REVIEW

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

DECLARATION OF COUNSEL

Pursuant to Supreme Court Rule 29.2, I, Margaret A. Katze, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and counsel for petitioner, Larry Begay, and that I personally mailed a copy of the petition for writ of certiorari to this court by first class mail, postage prepaid by depositing the original and ten copies in an envelope addressed to the Clerk of this Court, in the United States Post Office at 1135 Broadway Blvd. NE, Albuquerque, New Mexico, at approximately ____.m. on the 22d day of May, 2007.

_____

Margaret A. Katze
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS ..... Preceding and Attached to Petition Pursuant to S.Ct. R. 39.2

QUESTION PRESENTED FOR REVIEW i

DECLARATION OF COUNSEL ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW ix

JURISDICTIONAL STATEMENT x

FEDERAL STATUTORY PROVISION x

STATEMENT OF THE CASE 1

A. *Introduction* 1

B. *The District Court Proceedings.* 1

C. *The Tenth Circuit Proceedings* 3

ARGUMENT FOR ALLOWANCE OF THE WRIT 5

This case presents an important question of federal law that has not been, but should be, settled by this Court: is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act. 5

A. *Introduction* 5

B. *The ACCA.* 7

C. *This case involves a question of great importance* 7

D. *There are strong reasons to believe the circuit courts of appeals have decided the issue incorrectly.* 10

E. *This Court has evidenced its appreciation of the important implications of the ACCA.* 15

F. *This Court should grant certiorari.* 16

CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDICES:

APPENDIX A - DECEMBER 12, 2006, TENTH CIRCUIT OPINION

APPENDIX B - FEBRUARY 21, 2007, TENTH CIRCUIT ORDER DENYING PETITION FOR REHEARING

APPENDIX C - JULY 29, 2005, DISTRICT COURT JUDGMENT IN A CRIMINAL CASE

APPENDIX D - JULY 1, 2005, DISTRICT COURT MEMORANDUM OPINION AND ORDER

TABLE OF AUTHORITIES

Cases — Page

Comar Oil Company v. Helvering,
107 F.2d 709 (8th Cir. 1939) 12

Custis v. United States,
511 U.S. 485 (1994) 6, 15

Daniels v. United States,
532 U.S. 374 (2001) 6, 15

General Dynamics Land Systems, Inc. v. Cline,
540 U.S. 581 (2004) 11

Huguley Manufacturing Company v. Galeton Cotton Mills,
184 U.S. 290 (1902) 12

James v. United States,
127 S.Ct. 1586 (2007) 6, 14, 15

Leocal v. Ashcroft,
543 U.S. 1 (2004) 11, 13

Lopez v. Gonzales,
127 S.Ct. 625 (2006) 11

Pollgreen v. Morris,
911 F.2d 527 (11th Cir. 1990) 12

Shepard v. United States,
544 U.S.13 (2005) 6, 15

Southeastern Community College v. Davis,
442 U.S. 397 (1979) 12

Taylor v. United States,
495 U.S. 575 (1990) 6, 14, 15

United States v. Begay,
470 F.3d 964 (10th Cir. 2006) 1-5, 9-15

United States v. Booker,
543 U.S. 220 (2005) 3

United States v. DeSantiago-Gonzales,
207 F.3d 261 (5th Cir. 2000) 9

United States v. Doe,
960 F.2d 221 (1st Cir. 1992) 13

United States v. Gwartney,
2006 WL 2640616 (10th Cir. 2006)(unpub'd),
cert. denied,
2007 WL1174377 (April 23, 2007) 9

United States v. McCall,
439 F.3d 967 (8th Cir. 2006)(en banc) 9-14

United States v. McGill,
450 F.3d 1276 (11th Cir. 2006),
cert. denied,
127 S.Ct. 1160 (2007) 9

United States v. Mississippi,
380 U.S. 128 (1965) 12

United States v. Moore,
420 F.3d 1218 (10th Cir. 2005) 9

United States v. Morris,
2007 WL 1430307 (10th Cir. May 16, 2007)(unpub'd) 9

United States v. Philipp Overseas, Inc.,
651 F.2d 747 (C.C.P.A. 1981) 12

United States v. Sperberg,
432 F.3d 706 (7th Cir. 2005) 9

United States v. Veach,
455 F.3d 628 (6th Cir. 2006) 9

United States v. Walker,
393 F.3d 819 (8th Cir. 2005),
overruled by,
United States v. McCall,
439 F.3d 967 (8th Cir. 2006)(en banc) 9

Federal Statutes

18 U.S.C. § 922(g) 6-8

18 U.S.C. § 922(g)(1) 1

18 U.S.C. § 924(a)(2) 8

18 U.S.C. § 924(e) 2, 3, 5-11, 13, 15, 16

18 U.S.C. § 924(e)(1) 2

18 U.S.C. § 924(e)(2)(B) 7

18 U.S.C. § 924(e)(2)(B)(ii) 1-4, 6, 11, 15, 16

United States Sentencing Guidelines

U.S.S.G. § 2K2.1(a)(6) 1, 8

U.S.S.G. § 2K2.1(b)(5) 1

U.S.S.G. § 3E1.1(a) 1

U.S.S.G. § 3E1.1(b) 1

U.S.S.G. § 4A1.1 1

U.S.S.G. § 4B1.2(a)(2) 9

U.S.S.G. § 4B1.4(b)(3)(A) 2

U.S.S.G. Ch. 5, Pt. A (Sentencing Table). 1, 3

State Statute

N.M. Stat. Ann. § 66-8-102(G)-(J) 2

Other Authorities

H. R. Rep. No. 99-849 (1986) 14

MADD, *MADD-NC 2006 Legislative Updates* available at www.madd.org/home/3337 . 8

United States Department of Labor, *Impaired Driving*, www.dol.gov/asp/programs/drugs/workingpartners/sp_iss/safetyfacts.asp 8

H. R. Rep. No. 99-849 (1986) 14

MADD, *MADD-NC 2006 Legislative Updates* available at www.madd.org/home/3337 . 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Larry Begay respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit affirming the mandatory minimum portion of his sentence imposed by the United States District Court for the District of New Mexico.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, *United States v. Begay*, 10th Cir. No. 05-2253, 470 F.3d 964 (10th Cir. 2006), affirming the application of the Armed Career Criminal Act ("ACCA") to Mr. Begay was filed on December 12, 2006. That opinion is attached as Appendix A to this petition. The February 21, 2007, Tenth Circuit order denying Mr. Begay's petition for rehearing is attached as Appendix B. The United States District Court for the District of New Mexico's July 29, 2005, judgment and

sentence is attached as Appendix C. The district court's memorandum opinion and order holding the Armed Career Criminal Act applied is attached as Appendix D.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Tenth Circuit Court of Appeals denied Mr. Begay's petition for rehearing on February 21, 2007. Pursuant to Supreme Court Rules 13.1 and 13.3 and 28 U.S.C. §2101(c), this petition is timely filed if filed on or before May 22, 2007.

FEDERAL STATUTORY PROVISION

The federal statutory provision involved in this case is:

18 U.S.C. § 924(e), which provides in part:

> **(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony ... committed on occasions different from one another, such person shall be ... imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> **(2)** As used in this subsection—...
>
> **(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, ... that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; ....

STATEMENT OF THE CASE

A. *Introduction*

The question whether felony driving while intoxicated ("DWI") is a "violent felony" under the Armed Career Criminal Act ("ACCA") has been squarely presented throughout the proceedings below. The district court held that Larry Begay's three felony DWI convictions rendered him subject to the ACCA's fifteen-year mandatory minimum on the grounds that felony DWI is a "violent felony" under the "otherwise" or residual clause of 18 U.S.C. § 924(e)(2)(B)(ii). A divided Tenth Circuit panel affirmed that holding. In a concurring opinion, Judge Lucero, while acknowledging the force of the dissent's argument, joined only a portion of Judge Hartz's opinion. Judge McConnell wrote a thoughtful, well-reasoned dissent.

B. *The District Court Proceedings*

In the United States District Court for the District of New Mexico, Mr. Begay pleaded guilty to one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *United States v. Begay*, 470 F.3d 964, slip. op. at 1 (10th Cir. 2006)[1](Appendix ("App.") A). The presentence report determined that Mr. Begay's total adjusted offense level was 15 and he was in criminal history category VI, resulting in a guideline range of 41 to 51

---

[1] Mr. Begay's references to the slip opinion are to Judge Hartz's opinion for the court unless otherwise indicated.

months. (Presentence Report ¶¶ 23, 24, 29, 30, 59, 84). *See* U.S.S.G. § 2K2.1(a)(6) & (b)(5), § 3E1.1(a) & (b), § 4A1.1, Ch. 5, Pt. A (Sentencing Table).

The government objected to the presentence report's failure to find Mr. Begay to be an armed career criminal under 18 U.S.C. § 924(e) based on his three prior felony DWI convictions. *See* N.M. Stat. Ann. § 66-8-102(G)-(J). The government contended felony DWI is a "violent felony" under the ACCA. The government pointed to § 924(e)(2)(B)(ii), which includes as a "violent felony" a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Without taking into account the crimes listed before the "otherwise" clause, the government asserted that, since DWI creates a serious potential risk of physical injury to another, it fits the ACCA definition. (Document[2] ("Doc.") 25 at 2-5; Doc. 26 at 2-5). Under § 924(e)(1), a mandatory minimum sentence of 15 years applied, and under U.S.S.G. § 4B1.4(b)(3)(A), a final total adjusted offense level of 31 was warranted due to the application of the ACCA, the government argued. (Doc. 25 at 5-6; Doc. 26 at 6).

Mr. Begay disagreed, arguing that a proper reading of the "otherwise" clause in light of its context and the legislative history of the ACCA establishes that DWI is not a "violent felony" because it is very unlike the other crimes listed before that clause, i.e., burglary, arson, extortion, and offenses involving use of explosives. (Doc. 27 at 1-5).

---

[2] All references to documents are to documents in the district court record proper.

The district court agreed with the government. The court held that Mr. Begay's three felony DWI convictions were for violent felonies under the ACCA. App. A at 3; App. D. Accordingly, Mr. Begay was subject to a 15 year mandatory minimum, *see* § 924(e)(1), and a guideline range of 188 to 235 months, *see* U.S.S.G. Ch. 5. Pt. A (Sentencing Table). App. A at 3. The court imposed a sentence of 188 months—137 months above the top of the guideline range applicable absent the ACCA. App. A at 1; App. C at 2.

C. *The Tenth Circuit Proceedings*

On appeal to the Tenth Circuit, Mr. Begay challenged the application of the ACCA to his prior felony DWI convictions, raising the same arguments he raised below. As dissenting Judge McConnell explained, Mr. Begay's challenge presented the Tenth Circuit with a choice of two interpretations. App. A, Dissent at 5-7. Under the "all crimes" interpretation favored by the government, the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii) covers any crime, regardless of its nature, that involves conduct presenting a serious risk of physical injury to another. Under the "similar crimes" interpretation favored by Mr. Begay, the residual clause is limited to crimes of a nature similar to the crimes enumerated before that clause—burglary, arson, extortion, and crimes using explosives—, i.e., crimes potentially involving violent, aggressive conduct.

The appeal prompted three opinions by the three judge panel. A majority adopted the "all crimes" approach, holding felony DWI is a violent felony under the ACCA[3]. Judge Hartz reasoned that the ordinary meaning of the phrase "conduct that presents a serious potential risk of physical injury" certainly includes DWI. App. A at 14. Judge Hartz opined that the term "violent felony" defined by that language and the short title of the statute—"The Armed Career Criminal Act"—does not override the meaning of the statutory definition itself. App. A at 14-15. Judge Hartz posited that that definition served the purpose of imposing long terms of imprisonment on those who have displayed contempt for human life, not just those whose prior crimes would be more dangerous by the possession of a firearm. App. A at 15-18. Judge Hartz found unhelpful the ACCA's legislative history and canons of statutory construction. App. A at 22.

Judge Lucero joined only in that part of Judge Hartz's opinion regarding the ordinary meaning of the "otherwise" clause. App. A, Concurrence ("Con."). Judge Lucero believed the statute's language, in particular the word "otherwise," is so unambiguous it does not allow consideration of the legislative history. *Id.*. Judge Lucero acknowledged dissenting Judge McConnell was "right to highlight the dramatic increase in sentence" Mr. Begay received as a result of the ACCA's application and he agreed with Judge McConnell that

---

[3] The Tenth Circuit remanded for resentencing on the ground that the district court had misunderstood its discretion under *United States v. Booker*, 543 U.S. 220 (2005), to sentence at or above the mandatory minimum, but below the guideline range. App. A at 23-27.

DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii)." *Id.*. Nevertheless, Judge Lucero felt the statute's wording clearly covered DWI. *Id.*.

In dissent, Judge McConnell noted the more than threefold increase in Mr. Begay's sentence from a guideline range of 41 to 51 months to over 15 years. App. A, Dissent at 1. Judge McConnell found the statutory language was capable of both the "all crimes" and the "similar crimes" interpretation, with the "similar crimes" interpretation being the more likely. App. A, Dissent at 5-7. Judge McConnell determined a number of statutory construction tools all supported the latter interpretation. App. A, Dissent at 3-4, 8-18. Judge McConnell pointed to: the phrase "violent felony" defined by the "otherwise" clause; the history and purpose of the ACCA—to keep firearms out of the hands of those who commit serious crimes as a means of livelihood and whose crimes would be more dangerous if committed with a firearm—; the specific legislative history; the well-established canons of statutory construction *noscitur a sociis* and *ejusdem generis*; the "all crimes" interpretation's violation of another canon of construction that disapproves of surplusage; and, if necessary, the rule of lenity. App. A, Dissent at 3-4, 8-18. Judge McConnell concluded the ACCA's residual clause covers only those "violent, active" crimes, like burglary, arson, extortion, and crimes involving explosives, that are "typical of career criminals, and which are more dangerous when committed in conjunction with firearms." App. A, Dissent at 16, 18. Accordingly,

Judge McConnell maintained, felony DWI is not a "violent felony" under the ACCA. App. A, Dissent at 18.

Mr. Begay filed a petition for rehearing en banc. With Judge McConnell dissenting, the Tenth Circuit denied the petition without explanation. App. B.

ARGUMENT FOR ALLOWANCE OF THE WRIT

This case presents an important question of federal law that has not been, but should be, settled by this Court: is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act.

A. *Introduction*

This Court should grant certiorari in this case because it squarely presents an important question of federal law: whether felony driving while intoxicated ("DWI") is a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"). Application of the fifteen year minimum sentence mandated by the ACCA dramatically increases the sentence a defendant convicted of possessing a firearm in violation of 18 U.S.C. § 922(g) receives. If felony DWI is a "violent felony" under the ACCA, as a majority of the Tenth Circuit panel decided in this case, many defendants will suffer those severe consequences, given the prevalence of felony DWI statutes and DWI convictions. As the three different opinions of the Tenth Circuit in this case illustrate, the issue whether felony DWI is an ACCA predicate felony involves significant statutory construction principles relevant in non-ACCA contexts. As Judge McConnell's thoughtful, well-reasoned dissent demonstrates,

powerful arguments support a resolution of the issue Mr. Begay raises that is different from the Tenth Circuit majority's.

On a number of occasions this Court has considered cases involving the ACCA. *See Shepard v. United States*, 544 U.S.13 (2005); *Daniels v. United States*, 532 U.S. 374 (2001); *Custis v. United States*, 511 U.S. 485 (1994); *Taylor v. United States*, 495 U.S. 575 (1990). Most recently, in *James v. United States*, 127 S.Ct. 1586 (2007), this Court addressed the question whether attempted burglary, as defined by Florida law, fell within the ACCA's residual provision for crimes that "otherwise involv[e] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This case presents the question whether that same "otherwise" clause includes felony DWI. In *James*, the kind of risk associated with the prior offense was similar to the confrontational risk associated with the enumerated offenses. In this case, the DWI risk is not the same kind of risk associated with those enumerated offenses. Thus, this case provides an opportunity for this Court to further clarify the meaning of the ACCA.

For all of these reasons, this court should grant certiorari in this case.

B. *The ACCA*

The ACCA requires the imposition of a mandatory minimum sentence of 15 years on a defendant convicted of a violation of 18 U.S.C. § 922(g)—a statute that prohibits firearm possession by certain categories of people—who has a total of three prior convictions for certain offenses. Those offenses are "serious drug offenses" that carry a maximum sentence

of at least ten years and "violent felonies." 18 U.S.C. § 924(e). The term "violent felony" means:

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

18 U.S.C. § 924(e)(2)(B). The question raised in this case is whether Congress intended to include felony DWI in the phrase "otherwise involves conduct that presents a serious potential risk of physical injury to another."

C. ***This case involves a question of great importance.***

The question this case raises—whether felony DWI is a "violent felony" under the ACCA—is an exceptionally important question that merits this Court's consideration. First, as Judge Lucero's and Judge McConnell's opinions indicate, App. A, Con.; App. A, Dissent at 1, defendants suffer dramatic increases in sentences as a result of the ACCA's application. A defendant with a guideline range that includes or exceeds the ten year maximum sentence for violating 18 U.S.C. § 922(g), *see* 18 U.S.C. § 924(a)(2), receives at least an additional five years of imprisonment, and more likely much more under the Sentencing Guidelines, *see* U.S.S.G. § 4B1.4(b)(3)(raising the offense level to 33 or 34), when the sentencing court employs the ACCA. More typically, a defendant whose prior offenses were felony DWIs

would be in a guideline range close to the one Mr. Begay was in—41 to 51 months—based on a total adjusted offense level of 15 and a criminal history category VI. (PSR ¶ 84). U.S.S.G. § 2K2.1(a)(6) provides for a base offense level of 14 where the defendant is a prohibited person who has no prior convictions for crimes of violence or controlled substance offenses. Under the ACCA, the typical felony DWI, § 922(g) defendant would receive a sentence more than three times as high as the top of the guideline range and more than four times as high as the low end. The guideline range could be as high as 235 months or more, as in this case. App. A at 3. In this case, the district court imposed a 188-month sentence. Thus, the issue whether felony DWI is a "violent felony" under the ACCA is extremely important to felony DWI, § 922(g) defendants and to the criminal justice system.

Second, many defendants will suffer the dramatic consequences of a decision that the ACCA covers prior felony DWIs. All but three states have adopted felony DWI statutes. See MADD, *MADD-NC 2006 Legislative Updates* available at www.madd.org/home/3337 (last visited May 22, 2007). In 2003, approximately 1.4 million drivers were arrested for driving under the influence of alcohol or narcotics. United States Department of Labor, *Impaired Driving*, www.dol.gov/asp/programs/drugs/workingpartners/sp_iss/safetyfacts.asp (last visited May 22, 2007).

Already three circuit courts, including the Tenth Circuit three times, have been faced with a defendant whose sentence was drastically enhanced due to the application of the ACCA to felony DWIs. *See Begay*; *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006)(en

banc); *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005); *United States v. Morris*, 2007 WL 1430307 (10th Cir. May 16, 2007)(unpub'd); *United States v. Gwartney*, 2006 WL 2640616 (10th Cir. 2006)(unpub'd), *cert. denied*, 2007 WL1174377 (April 23, 2007). A number of circuit courts have dealt with defendants whose sentences were enhanced by virtue of the sentencing guideline career offender provisions, see U.S.S.G. § 4B1.2(a)(2), due to prior felony DWI convictions. *United States v. Veach*, 455 F.3d 628 (6th Cir. 2006); *United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006), *cert. denied*, 127 S.Ct. 1160 (2007); *United States v. Moore*, 420 F.3d 1218 (10th Cir. 2005); *United States v. Walker*, 393 F.3d 819 (8th Cir. 2005), *overruled by, McCall*; *United States v. DeSantiago-Gonzales*, 207 F.3d 261 (5th Cir. 2000). The resolution of the question whether felony DWI is a "violent felony" under the ACCA impacts a significant and growing number of defendants.

Third, as the differing thoughtful opinions in this case and in the Eighth Circuit en banc *McCall* case illustrate, the issue this case presents precipitates a wide-ranging exploration of statutory construction issues: what is plain language; what is ordinary meaning; when should an interpreting court look beyond the statutory language; what is the significance of the generic term defined by the statutory language; what is the significance of the short title of an act; what are the purposes of the ACCA; what role does legislative history play; when and how do the construction canons of *noscitur a sociis* and *ejusdem generis* apply; when may the rule of lenity be invoked. Review of these issues has implications beyond the resolution of the particular question Mr. Begay raises. Thus, this

case presents an opportunity for this Court to address important statutory construction principles.

Because resolution of the issue this case raises—whether felony DWI is a "violent felony" under the ACCA—will dramatically affect many defendants and involves weighty statutory construction issues, this Court should grant certiorari, as it did for the question whether attempted burglary under Florida law was a "violent felony" under the ACCA. *See James*.

D. *There are strong reasons to believe the circuit courts of appeals have decided the issue incorrectly.*

As Judge McConnell's dissent in this case and the three-judge dissent in *McCall*, 439 F.3d at 974-983 (Lay, J., joined by Wollman and Bye, JJ., dissenting), demonstrate, there are strong reasons to believe the Seventh, Eighth and Tenth Circuits have decided incorrectly the question Mr. Begay presents. Judges McConnell and Lay set forth powerful arguments why felony DWI is not a "violent felony" under the ACCA, based on: the language itself; the phrase "violent felony" defined by the "otherwise" clause; the history and purpose of the ACCA; specific legislative history; the well-established canons of statutory construction that require judging language by its company and discourage interpretations that render words superfluous; and, if necessary, the rule of lenity. App. A, Dissent at 3-18; *McCall*, 439 F.3d at 974-983.

This Court has recently stressed "the cardinal rule that statutory language must be read in context." *Lopez v. Gonzales*, 127 S.Ct. 625, 631 (2006)(quoting *General Dynamics Land*

Systems, Inc. v. Cline, 540 U.S. 581, 596 (2004)). In interpreting the residual clause in the "violent felony" definition "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(2)(B)(ii), the clause must be read in light of the enumerated crimes that precede it. As Judge McConnell pointed out, App. A, Dissent at 7, by using the word "otherwise," Congress indicated a substantive connection between the listed crimes and the general phrase. Congress limited ACCA coverage to "felonies that, while not identical to burglary, arson, extortion, or explosives offenses, impose a similar sort of risk." *Id.*.

The Tenth Circuit panel majority's contrary interpretation suffers from at least two major flaws. First, to interpret the "otherwise" clause to include all crimes, without limitation, that present a serious potential risk of physical injury to another, renders the word "otherwise" and much of the rest of the definition of "violent felony" superfluous, contrary to a well-established rule of construction that every word should have a meaning if at all possible. App. A, Dissent at 7; *McCall*, 439 F.3d at 978. See *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004). Second, if one does accord the meaning the Tenth Circuit panel majority apparently accords to "otherwise," i.e., "in a manner different from," App. A at 22, the definition does not conform to the meaning the majority attributes to it. Under that interpretation, the "otherwise" clause only applies when the risk is created in a manner different from how the risk is created when the enumerated crimes are committed. Surely, the Tenth Circuit did not read the "otherwise" clause in that manner.

The word "otherwise" does not plainly mean what the Tenth Circuit says it does. On a number of occasions, courts, including this Court, have interpreted "otherwise" to mean "similar" to other entities. *See Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979)("otherwise qualified" disabled person means the person is qualified for the position in the same way as non-disabled people are); *United States v. Mississippi*, 380 U.S. 128, 136-138 (1965)("otherwise qualified" voters means voters who are as qualified as voters of a different race); *Huguley Manufacturing Company v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902)(that a case may be brought by "certiorari or otherwise" means the manner of reaching the Court must be *ejusdem generis* with certiorari); *Pollgreen v. Morris*, 911 F.2d 527 (11th Cir. 1990)("represented by counsel or otherwise" referred to representation that was similar to that of counsel); *United States v. Philipp Overseas, Inc.*, 651 F.2d 747, 751 (C.C.P.A. 1981)(in the phrase "drilled, punched or otherwise advanced," "otherwise advanced" refers to an activity that is *ejusdem generis* with drilling and punching); *Comar Oil Company v. Helvering*, 107 F.2d 709, 711 (8th Cir. 1939)("otherwise" must be construed as limited by the rule *noscitur a sociis*). The ordinary or plain meaning of the "otherwise" clause does not support the Tenth Circuit's position.

On the other hand, as Judges McConnell and Lay have pointed out, App. A, Dissent at 3-4, *McCall*, 439 F.3d at 981-982, the term the "otherwise" clause defines—"violent felony"—strongly supports the "similar crimes" interpretation of that clause. As then-Circuit Judge Breyer explained, speaking for the First Circuit, after opining that Congress did not

intend the residual clause of the ACCA to include drunk driving, he stated: "we must read the ["otherwise" clause] definition in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992). This Court quoted that analysis approvingly in support of its decision in *Leocal*, 543 U.S. at 11. App. A, Dissent at 3-4; *McCall*, 439 F.3d at 982.

Likewise, the history and purpose of the ACCA, as this Court related in *Taylor*, 495 U.S. at 581-590, argue for including only crimes that might involve aggressive, violent conduct within the "otherwise" clause. In enacting the ACCA, "Congress focused on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-588. As Judge McConnell concluded, "it seems beyond question that drunk drivers fall outside any reasonable understanding of Congress's definition of an "armed career criminal." App. A, Dissent at 8-9. "Drunk drivers do not drive drunk 'as their means of livelihood,' and the threat they pose to other persons has nothing to do with whether they possess weapons." App. A, Dissent at 9.

The specific legislative history with respect to the "otherwise" clause also powerfully suggests the "similar crimes" interpretation is appropriate. App. A, Dissent at 9-12; *McCall*, 439 F.3d at 979-981. The House Committee on the Judiciary discussed the legislation as follows:

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious risk of physical injury to others. This will add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person.

Taylor, 495 U.S. at 587 (quoting H. R. Rep. No. 99-849, p. 3 (1986))(first emphasis in original, second emphasis added). This Congressional explanation "makes clear that Congress intended the expanded definition to cover only ... crimes 'similar' to burglary, arson, extortion, and use of explosives." App. A, Dissent at 10. *See also McCall*, 439 F.3d at 980.

Two well-established canons of statutory construction—*noscitur a sociis* and *ejusdem generis*—also support that conclusion. Under those doctrines, the meaning of the "otherwise" clause must be tied to the specific terms it accompanies, i.e. it is restricted to violent, active crimes like those listed, not like drunk driving. App. A, Dissent at 16. *See also James*, 127 S.Ct. at 1594 (noting that the specific offenses enumerated in clause (ii) provide one baseline from which to measure whether "similar conduct" presents the requisite risk of physical injury); *id.* at 1595 (noting attempted burglary "poses the same kind of risk" as the enumerated crime of burglary). Finally, even if after all the above analysis, the "otherwise" clause was ambiguous, the rule of lenity would require a holding that felony

DWI is not a predicate felony under the ACCA. App. A, Dissent at 17-18; *McCall*, 439 F.3d at 983.

As Judge McConnell concluded: "The 'similar crimes' interpretation thus finds support in an impressive array of interpretive methods: ordinary meaning, avoidance of surplusage, consistency with general statutory purposes, specific legislative history, and two canons of statutory construction, plus the rule of lenity." App. A, Dissent at 18. Extremely forceful reasons exist why the circuit courts addressing the matter have wrongly decided the exceptionally important question whether felony DWI is a "violent felony" under the ACCA. This court should resolve that question.

E. *This Court has evidenced its appreciation of the important implications of the ACCA.*

This Court has recognized the importance of the ACCA in the federal criminal justice system by addressing questions that arose in the ACCA context. *See James*; *Shepard*; *Daniels*; *Custis*; *Taylor*. In *James*, *Shepard* and *Taylor*, this Court interpreted various aspects of the ACCA. In *James*, this Court interpreted the very same "otherwise" clause that requires interpretation in this case. As this Court observed in that case, *id.*, 127 S.Ct. at 1595, the Florida attempted burglary offense involved in *James* poses the same kind of risks of physical injury that the enumerated offenses preceding the "otherwise" clause pose. In this case, on the other hand, DWI creates a completely different kind of risk than the confrontational risk the active, violent, enumerated offenses create. Consequently, this case presents an opportunity for this Court to once again interpret the ACCA, and in particular the

residual clause of 18 U.S.C. § 924(e)(2)(B)(ii), but in a meaningfully different context. This Court should take advantage of that opportunity.

F. ***This Court should grant certiorari.***

This case squarely presents an important federal question of law the resolution of which will have profound ramifications for many criminal defendants: whether felony DWI is a "violent felony" under the ACCA. The circuit courts addressing the question have so far incorrectly determined that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) applies to DWI, despite strong dissents, including Judge McConnell's in this case. This case provides an ideal opportunity for this Court to explore a number of statutory construction principles and continue to clarify the implications of the ACCA. For these reasons, this Court should grant certiorari.

CONCLUSION

For the reasons stated above, petitioner Larry Begay requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489

_____
Margaret A. Katze
Attorney for Petitioner

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2006

LARRY BEGAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Margaret A. Katze, Assistant Federal Public Defender, declare under penalty of perjury that I am a member of the bar of this court and, as counsel for Larry Begay, I personally mailed copies of the motion for in forma pauperis and the petition for writ of certiorari by first class mail, postage prepaid to the Solicitor General, Department of Justice, Washington, DC 20530, and to Assistant United States Attorney David N. Williams, P.O. Drawer 607, Albuquerque, NM 87103, this 22d day of May, 2007.

_____

Margaret A. Katze
Attorney for Petitioner
FEDERAL PUBLIC DEFENDER
111 Lomas NW, Suite 501
Albuquerque, NM 87102
(505) 346-2489